

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. OSAB 2002-35
)	
CRAIG A. GOMES,)	ORDER NO. 61
)	
Complainant,)	ORDER DENYING, IN PART, AND
)	GRANTING, IN PART, HECO'S
vs.)	MOTION TO DISMISS; AND NOTICE
)	OF HEARING
HAWAIIAN ELECTRIC COMPANY,)	
)	
Respondent,)	
)	
and)	
)	
DIRECTOR DEPARTMENT OF LABOR)	
AND INDUSTRIAL RELATIONS,)	
)	
Appellee.)	
)	

ORDER DENYING, IN PART, AND GRANTING, IN PART,
HECO'S MOTION TO DISMISS; AND NOTICE OF HEARING

On August 21, 2002, Complainant CRAIG A. GOMES (GOMES), proceeding pro se, filed a notice of contest appealing the decision of the Hawaii Occupational Health and Safety Division (HIOSH) of the Department of Labor and Industrial Relations denying GOMES' discrimination complaint against his employer, Respondent HAWAIIAN ELECTRIC COMPANY (HECO). The notice of contest was duly transmitted to the Hawaii Labor Relations Board (Board) on November 20, 2002.

On December 9, 2002, GOMES filed a request to postpone the initial conference scheduled on December 11, 2002 to January 14, 2003 pursuant to the agreement of the parties.

Thereafter, on December 30, 2003, GOMES filed a request to indefinitely postpone the initial conference until after the conclusion of an appeal pending before the Hawaii Supreme Court in an unrelated matter. In Order No. 27, dated January 6, 2003, the Board denied GOMES' request because he had already received a one month continuance of the initial conference and the indefiniteness of the length of postponement could affect the witnesses' memories.

On January 14, 2003, the Board conducted an initial conference in this matter. Although GOMES identified his only issues as the quality and conclusions of the HIOSH

investigation, the Board in Pretrial Order No. 29, dated January 15, 2003, identified the issue to be determined as whether HECO discriminated against GOMES as a result of his filing HIOSH complaints. Discovery was to commence on February 27, 2003 and end on April 28, 2003. Trial was scheduled for May 12, 2003.

On February 27, 2003, the day discovery was scheduled to commence, GOMES submitted a letter requesting a two-month extension of all deadlines because of his work schedule. Based upon HECO's and the DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (DIRECTOR)'s objections to GOMES' request for an extension of deadlines, the Board denied GOMES' request after consideration of the previous continuances which had been granted. After being orally advised of the Board's decision, GOMES filed a request for reconsideration on March 7, 2003. The Board denied Complainant's Request to Continue Deadlines and Complainant's Request for Reconsideration in Order No. 39, dated March 28, 2003.

On May 12, 2003, an evidentiary hearing was convened. After reading his opening statement GOMES requested a continuance of the hearing because of illness. HECO objected to the continuance contending that it was part of a pattern of delay, but in order to preserve GOMES' right of representation, the Board continued the hearing until May 29, 2003. In Order No. 44, Order Continuing Hearing, dated May 21, 2003, the Board further ordered GOMES to file a request to continue the scheduled hearing supported by a doctor's certificate prior to the hearing if his physical condition made it impossible to effectively represent himself. The Board also scheduled a hearing on any motion to dismiss filed on jurisdictional grounds on May 29, 2003 prior to the continued hearing on the merits.

On May 22, 2003, HECO filed a motion to dismiss for lack of jurisdiction. On May 27, 2003 GOMES filed a request to continue the proceedings after June 6, 2003. The request was accompanied by a doctor's note indicating that acute bronchitis and asthma made him unable to perform his usual duties until after that date.

On May 28, 2003, the Board in Order No. 47 scheduled a hearing on HECO's motion to dismiss for June 16, 2003 and the trial on June 23, 2003. On May 28, 2003, GOMES requested that the trial be moved from June 23, 2003 to June 19, 2003 because of a conflict with his work schedule. On May 29, 2003 the Board granted GOMES' request and rescheduled the trial on June 19, 2003.

On June 13, 2003, the last business day before the hearing scheduled on HECO's motion to dismiss on June 19, 2003, GOMES filed a request to postpone the hearing with an accompanying doctor's certificate. Upon convening the hearing on June 16, 2003, HECO objected to a postponement for, inter alia, lack of proper service. GOMES appeared at the hearing and withdrew his request to postpone. Arguments on the motions then proceeded with all parties being given a full and fair opportunity to be heard.

Based upon the record and arguments presented, the Board makes the following findings of fact and conclusions of law and hereby denies, in part, and grants, in part, HECO's motion to dismiss.

FINDINGS OF FACT

1. GOMES was at all times relevant a Junior Control Operator and an employee, within the meaning of Hawaii Revised Statutes (HRS) § 396-3, of Respondent HECO.
2. HECO is an employer, within the meaning of HRS § 396-3.
3. On or about April 1, 1998 GOMES filed health and safety complaints with both HECO and HIOSH.
4. On or about June 29, 1998, GOMES filed a discrimination complaint with HIOSH alleging a retaliatory denial of a promotion and a reprimand.
5. On or about September 16, 1998, GOMES requested a waiver of a promotion he had received to Control Operator.
6. On October 1, 1998, HECO denied the waiver.
7. On or about March 8, 1999, HIOSH and HECO settled GOMES' discrimination complaint. As part of the settlement, GOMES' reprimand records were expunged.
8. On or about October 22, 2001, after the company ordered a psychiatric report, HECO notified GOMES that his waiver would be granted. GOMES was thereafter returned to Junior Control Operator status but with a loss of seniority as a reputed result of the new placement.
9. On or about November 14, 2001, GOMES filed a 16-page, single spaced, typewritten complaint with HIOSH alleging numerous acts of discrimination dating back to 1998.
10. After an extensive investigation, HIOSH advised GOMES by letter on or about August 5, 2002 that it was closing his complaint. The letter further advised, "[i]f you disagree, you may file an appeal by original letter, no later than twenty (20) calendar days from receipt of this letter."

11. On or about September 25, 2002, HIOSH sent another letter to GOMES. The identified purpose of the letter was “to further clarify why HIOSH made its determination that there was insufficient evidence to find that you were in fact discriminated against.” The letter went on to elaborate the basis of the decision and concluded with the hope that “this document will help you better understand why we made the decision that we did and clear up any questions that you may have had as a result of the August 5, 2002 letter.”

DISCUSSION

In its motion to dismiss HECO argues two grounds for dismissal. HECO contends that GOMES failed to timely file a notice of contest as required by HRS § 396-11(e)¹ and failed to file a timely complaint as required by HRS § 396-8(e)(4).² GOMES asserts that the notice of contest was timely filed pursuant to HIOSH’s explicit instructions and that the occurrence of his discriminatory demotion and loss of seniority was clearly within the period prescribed by statute. GOMES further alleges that the complained of employer acts falling outside the period should be considered actionable as a continuing violation.

Notice of Contest

HECO asserts that the Board lacks jurisdiction over the instant complaint because GOMES failed to file the requisite notice of contest within 20 days of HIOSH’s final order closing GOMES’ complaint. Although the employer admits that GOMES filed a notice of contest on August 21, 2002, which is within 20 days of receipt of the August 5, 2002 HIOSH letter notifying him of the closing of his case and advising him to file a notice of contest within 20 days, HECO argues that GOMES’ receipt of a second letter from HIOSH on August 25, 2002 indicated a retention of jurisdiction by HIOSH and constituted the final order which had to be timely contested by GOMES. HECO argues that the second letter constituted

¹HRS § 396-11(e) provides as follows:

Any employee or representative of employees may file a notice of contest of an order of the director denying a complaint of discrimination filed by an employee pursuant to section 396-8(e); provided that in each case the notice is filed within twenty days after receipt of the order by the employee.

²HRS § 396-8(e)(4) provides as follows:

Any employee who believes that there has been a discharge or discrimination against the employee by any person in violation of this subsection may, within sixty days after the violation occurs, file a complaint with the director alleging unlawful discharge or discrimination and setting forth the circumstances thereof;

the “notice of the director denying the complaint” so that GOMES’ failure to file a second notice of contest precludes this appeal.

In support of its argument, HECO quotes the following proposition from Bocalbos v. Kapiolani Medical Center for Women and Children, 89 Hawai‘i 436, 438, 974 P.2d 1026, 1028 (1999):³

For the purpose of HRS § 91-14(a) we have defined “final order” to mean an order ending proceedings, leaving nothing further to be accomplished. Gealon v. Keala, 60 Haw. 513, 520, 591 P.2d 621, 626 (1979). Consequently an order is not final if the rights of a party involved remain undetermined or if the matter is retained for further action. Id.

But no matter what the applicability of the cited case, the Board cannot conclude that GOMES’ failure to contest the second letter is fatal to the Board’s jurisdiction.

The first letter at issue unambiguously notified GOMES that HIOSH was closing its investigation of his complaint and that any notice of contest needed to be received within 20 days. The second letter contained no indication that HIOSH had retained jurisdiction over the complaint. Rather it purported to “clarify” the reasons for the previously made decision and “clear up any questions” that may have arisen as a result of the previously communicated decision.

HECO’s motion to dismiss on the grounds of failure to file a timely notice of contest is accordingly denied.

Timeliness of Occurrence

HECO also argues that as HIOSH concluded, GOMES filed his current discrimination complaint within 60 days of the occurrence as required by statute. Although it concedes the October 22, 2001 granting of GOMES’ requested waiver took place well within the period tolled by his complaint of November 14, 2001, HECO argues that the granting of GOMES’ request cannot serve as the discriminatory occurrence because HECO was merely complying with GOMES’ request. HECO further argues that the litany of discriminatory acts that GOMES alleges occurring as far back as 1998 cannot serve as the required “occurrence” because they preceded the statutory window and must be ruled inadmissible at trial as irrelevant.

³It is questionable whether Bocalbos, *supra*, is appropriately cited for this proposition. In fact, the quoted language was a quote for the opinion of the Intermediate Court of Appeal that was **vacated** in Bocalbos. The cited case, in fact, better supports a result inapposite from that argued by HECO.

HECO argues in its motion to dismiss that these allegations, even if true do not state a claim upon which relief can be granted, see Hawaii Rules of Civil Procedure Rule 12(b)(6), so that dismissal is required. Such a dismissal is generally disfavored but warranted “if it appears beyond a reasonable doubt that the plaintiff can prove no set of facts entitling a plaintiff to relief.” Bertelmann v. Taas Associates, 69 Haw. 95, 99, 735 P.2d 930 (1987).

GOMES raises the requisite reasonable doubt. He argues that the demotion, loss of seniority, and nonpreferred schedule was not a result of a granting of a waiver but retaliation. A demotion and loss of seniority can certainly qualify for the requisite adverse personnel action and GOMES could conceivably prevail upon the requisite proof of motivation, knowledge, and nexus to the protected activity. This potential “set of facts entitling a plaintiff to relief” compels the denial of the motion to dismiss outright.

HECO also argues that GOMES should be barred from relying upon or introducing evidence of any alleged discriminatory acts occurring outside of the 60-day period prior to his filing of his November 14, 2001 HIOSH complaint. It is clear that GOMES may not rely on any such time-barred violations as the basis for his complaint for relief. The clear and unequivocal language of HRS § 396-8(e)(4) requires complaints to be filed within 60 days after the violation occurs. Thus, such claims, to the degree that they are alleged in the complaint must be dismissed and HECO’s motion to dismiss is granted to that effect.

With regard to the admission of evidence of alleged prior violations at the evidentiary hearing, the controlling rule is Hawaii Administrative Rules § 12-42-8(g)(8)(B):

All irrelevant, immaterial, or unduly repetitious evidence shall be excluded. . . .

While evidence regarding the nonactionable violations may be relevant, see Hawaii Rules of Evidence Rule 401, to prove facts in dispute regarding the alleged discriminatory demotion they will only be admitted over objection pursuant to an offer of proof to that effect. The proffered evidence will also be subject to objection as immaterial or unduly repetitious.

It is therefore ordered that HECO’s motion to dismiss is accordingly, denied, in part, and granted, in part consistent with this order.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this contest pursuant to HRS § 396-11.

2. The Board concludes that GOMES timely filed a contest from HIOSH's August 5, 2002 letter notifying him that it was closing his case.
3. The Board lacks jurisdiction over any adverse actions taken against GOMES by HECO more than 60 days before his filing of his HIOSH complaint on November 14, 2001.

ORDER

Based on the foregoing, HECO's motion to dismiss is granted, in part and denied, in part.

NOTICE OF HEARING


NOTICE IS HEREBY GIVEN that the Board will conduct a trial in this matter on September 9, 2003 at 9:30 a.m. in the Board's hearing room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii.

DATED: Honolulu, Hawaii, August 21, 2003.

HAWAII LABOR RELATIONS BOARD


BRIAN K. NAKAMURA, Chair


CHESTER C. KUNITAKE, Member


KATHLEEN RACUYA-MARKRICH, Member

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